Dato' Hj Kusaini bin Hj Hasbullah (Chairman of the Education Service Commission, Putrajaya) & Ors v Ali bin Suman

HIGH COURT (SHAH ALAM) — SUIT NO 21–565 OF 2010
NURCHAYA ARSHAD J
14 MAY 2012

Administrative Law — Disciplinary proceedings — Seeking order to quash findings — Applicant teacher issued stern warning and transferred to another school after admitting molesting three female students — Applicant dismissed from service three years later after another round of disciplinary proceedings found him guilty of same charges — Whether applicant punished twice for same offence — Whether art 7(2) of the Federal Constitution breached — Whether disciplinary tribunal which dismissed applicant guilty of procedural impropriety in failing to consider earlier punishment

The applicant, a senior assistant (co-curriculum) of a secondary school, received a letter from the president of the school's Disciplinary Committee stating that a complaint had been made against him that he had molested three female students. In his written representation in reply, the applicant admitted he was guilty of the charge. He expressed his regret and undertook not to repeat the offence. Subsequently, the Disciplinary Committee of the Hulu Langat Education Department informed the applicant by letter ('exh AS-5') that his conduct had breached the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations') and he was given a stern warning and transferred to another school. Three years later, another investigation was held against the applicant concerning the same incident and he was issued a show-cause letter by the first respondent in his capacity as chairman of the second respondent. The letter said the Disciplinary Board intended to take action against him under reg 37 of the 1993 Regulations on the charges stated in the show-cause letter and that he could be punished under reg 38 if found guilty. In his representation against the show-cause letter the applicant informed the first respondent of the previous disciplinary action that had been taken against him and enclosed exh AS-5 for his reference. The second respondent later wrote to inform the applicant he had been dismissed from service as he had failed to exculpate himself of the charges. The applicant applied to the High Court by way of judicial review for an order of certiorari to quash his dismissal on the ground he had been punished twice for the same

offence and based on the same facts and that this was a breach of art 7(2) of the Federal Constitution.

Held, allowing the application and quashing the dismissal:

(1) The court was satisfied the substance of the charges against the applicant in both proceedings were in respect of gross and indecent conduct towards three female students. He had been punished twice for the same charges by the Disciplinary Body at the Hulu Langat Education Department and also the disciplinary body at the Education Commission. The Hulu Langat Education Department issued a stern warning and transferred the applicant to another school (see paras 17–18).

(2) Exhibit AS-5 was not just a simple warning letter. In it, the Disciplinary Committee of the Hulu Langat Education Department had referred to the relevant disciplinary regulations and it was stated clearly that the offence committed by the applicant was in breach of reg 4(2)(d) and (g) of the 1993 regulations. Therefore, the punishment made against the applicant was in accordance with reg 38 of the 1993 regulations which provided from the most lenient, ie warning, to the most severe, ie dismissal (see para 19).

(3) In all fairness and justice there should only have been one charge against the applicant. Charging him twice for the same conduct clearly went against the spirit and intent of art 7 of the Federal Constitution (see para 20).

(4) The first respondent had not considered all factors in the applicant's second representation letter during the deliberation. This was a blatant procedural impropriety on his part as the applicant had referred to the initial disciplinary proceedings against him and he had enclosed the warning letter for the first respondent's easy reference (see para 22).

[Bahasa Malaysia summary

Pemohon, penolong kanan (ko-kurikulum) sebuah sekolah menengah, telah menerima surat daripada presiden jawatankuasa tatatertib sekolah menyatakan bahawa satu aduan telah dibuat terhadapnya bahawa dia telah mencabul tiga pelajar perempuan. Dalam representasi jawapan bertulisnya, pemohon mengaku dia bersalah terhadap pertuduhan. Dia menyatakan kekesalannya dan berjanji tidak akan mengulangi kesalahan itu. Berikutan itu, jawatankuasa tatatertib Jabatan Pelajaran Hulu Langat memberitahu pemohon melalui surat ('eksh AS-5') bahawa kelakuannya telah melanggar Peraturan-Peraturan Pegawai-Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan-Peraturn 1993') dan dia telah diberikan amaran tegas dan dipindahkan ke sekolah lain. Tiga tahun kemudian, satu lagi siasatan telah dibuat terhadap pemohon berkaitan kejadian yang sama dan dia telah diberikan surat tunjuk sebab oleh

responden pertama dalam kapasitinya sebagai pengerusi responden kedua. Surat tersebut menyatakan Lembaga Tatatertib berniat untuk mengambil tindakan terhadapnya di bawah peraturan 37 Peraturan-Peraturan 1993 atas pertuduhan-pertuduhan yang dinyatakan dalam surat tunjuk sebab tersebut dan bahawa dia boleh dihukum di bawah peraturan 38 jika didapati bersalah. Dalam representasinya terhadap surat tunjuk sebab itu pemohon memberitahu responden pertama berhubung tindakan tatatertib sebelum ini yang telah dibuat terhadapnya dan melampirkan eksh AS-5 sebagai rujukannya. Responden kedua kemudian menulis memberitahu pemohon dia telah dipecat daripada perkhidmatan kerana gagal membebaskan dirinya daripada pertuduhan-pertuduhan tersebut. Pemohon memohon ke Mahkamah Tinggi melalui semakan kehakiman untuk perintah *certiorari* untuk membatalkan pemecatannya atas alasan dia telah dihukum dua kali untuk kesalahan sama dan berdasarkan fakta sama dan bahawa ini adalah perlanggaran perkara 7(2) Perlembagaan Persekutuan.

Diputuskan, membenarkan permohonan dan membatalkan pemecatan:

(1) Mahkamah berpuas hati inti pati pertuduhan-pertuduhan terhadap pemohon dalam kedua-dua prosiding adalah berkaitan kelakuan kasar dan tidak sopan terhadap tiga pelajar perempuan. Dia telah dihukum dua kali untuk pertuduhan-pertuduhan sama oleh Lembaga Tatatertib di Jabatan Pelajaran Hulu Langat dan juga badan tatatertib di Suruhanjaya Pelajaran. Jabatan Pelajaran Hulu Langat telah mengeluarkan amaran tegas dan memindahkan pemohon ke sekolah lain (lihat perenggan 17–18).

(2) Ekshibit AS-5 bukan hanya surat amaran biasa. Dalamnya, jawatankuasa tatatertib Jabatan Pelajaran Hulu Langat telah merujuk kepada peraturan-peraturan tatataertib yang relevan dan adalah jelas bahawa kesalahan yang dilakukan oleh pemohon melanggar peraturan 4(2)(d) dan (g) Peraturan-Peraturan 1993. Oleh itu, hukuman yang dibuat terhadap pemohon adalah menurut peraturan 38 Peraturan-Peraturan 1993 yang memperuntukkan yang paling ringan, iaitu amaran, hingga yang paling berat, iaitu pemecatan (lihat perenggan 19).

(3) Demi keadilan sewajarnya hanya perlu ada satu pertuduhan terhadap pemohon. Dengan menuduhnya dua kali untuk kelakuan sama jelas melanggar semangat dan niat perkara 7 Perlembagaan Persekutuan (lihat perenggan 20).

(4) Responden pertama tiak mengambil kira semua faktor dalam surat representasi kedua pemohon semasa membuat keputusan. Ini adalah terang-terangan ketidakpatuhan prosedur di pihaknya kerana pemohon telah merujuk kepada prosiding tatatertib sebelumnya terhadapnya dan dia telahpun melampirkan surat amaran untuk rujukan mudah responden pertama (lihat perenggan 22).]

Notes

For a case on seeking order to quash findings, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 8.

Cases referred to

Abd Razak bin Atan v Dato' Hj Ahmad Ragib bin Hj Mohd Salleh (sued in his capacity as Assistant Chief Administrator to the Inspector General of Police (Disciplinary) & Ors [2010] 3 MLJ 753; [2010] 1 LNS 40, CA (refd)

Chief Constable of North Wales Police v Evans [1982] 3 All ER 141, HL (refd)

Harry Lee Wee v Law Society of Singapore [1985] 1 MLJ 1, PC (refd)

Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 CLJ 405, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

T Ganeswaran lwn Suruhanjaya Polis DiRaja Malaysia dan satu Lagi [2005] 6 MLJ 97; [2005] 3 CLJ 302, CA (refd)

Legislation referred to

Federal Constitution art 7, 7(2)

Public Officers (Conduct and Discipline) Regulations 1993 regs 4(2)(d), (2)(g), 37, 38

G Subramaniam (Ebrina Zubir with him) (Maniam Nair & Co) for the applicant.

Najwa Bustaman (Samsul Bolhasan with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Nurchaya Arshad J:

BACKGROUND FACTS

[1] The applicant, at the material time when the offence alleged took place, was a Penolong Kanan Ko-Kurikulum at Sekolah Menengah Kebangsaan Taman Jasmin 2, Kajang. The applicant received a letter dated 5 Mac 2007 from the President of the Disciplinary Committee of SMK Taman Jasmin 2 that a complaint was made against the applicant for molesting three female students. The applicant was required to provide a written representation within seven days from the date of receipt of the said letter (exh AS1). The applicant had replied via a letter dated 8 Mac 2007 informing the school of his regret of the incident (exh AS4). The applicant also made an undertaking not to repeat the offence (exh AS3).

[2] The applicant also attended a disciplinary inquiry held at the Hulu Langat Education Department on 9 March 2007. The officers attended were Puan Hjh Tipah bt Hassan (Pegawai Pelajaran Daerah Hulu Langat DG41), Encik Sharudin bin Yusuf (Penolong PPD Hulu Langat DG44), Encik

A Mohammad Zulkifli bin Ahmad Karman Shah (Pegawai Perhubungan PPDHL DG41) and Puan Norbayah bt Ishak (The principal of SMK Taman Jasmin 2). At the inquiry, the applicant had admitted the allegations made against him.

B **[3]** Subsequently, the Disciplinary Committee of the Hulu Langat Education Department issued a letter (exh AS5), informing the applicant that his conduct was in breach of the Public Officers (Conduct and Discipline) Regulations 1993 ('1993 Regulations'). The applicant was given a stern warning (*amaran keras*) and was later transferred to another school.

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[4] Three years later, another investigation was held against the applicant pursuant to a report received regarding his improper conduct to sexually harassed three female students, which was in breach of On 2 October 2009 (exh DKH1), the disciplinary authority decided that the offence complained of

D is of a nature which warrants a punishment of dismissal or reduction of rank and referred the case to the second respondent. On 5 August 2010 (exh DKH2), the first respondent as the chairman of the second respondent, found that there was a prima facie case and issued a show cause letter towards the applicant.

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[5] A show cause letter dated 9 August 2010 (exh AS7) was issued to the applicant, informing him that the Disciplinary Board intended to pursue a disciplinary action against him under reg 37 of the 1993 Regulations for the

F charges as in the show cause letter. In the said letter, it was stated that the applicant could be punished under reg 38 of the 1993 Regulations upon finding of guilt. The applicant was given 21 days from the receipt of the said letter to furnish his written representation to exculpate himself from the charge.

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[6] By a letter dated 2 August 2010, the applicant made his representation against the show-cause letter. In the said letter, he informed the first respondent of the previous disciplinary action against him and enclosed exh AS5 for the reference of the first respondent.

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[7] Vide a letter dated 25 October 2010 (exh AS9), the second respondent informed the applicant that the applicant had failed to exculpate himself from the charge and decided that he shall be dismissed with effect from 18 August 2010.

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[8] The applicant, being unsatisfied with the said decision, applied to this court for an order of certiorari to quash the said decision, on the ground that there was double jeopardy as he had been punish twice for the same offence, arising out from the same facts.

THE LAW ON JUDICIAL REVIEW

[9] The principles governing the approach by the courts when reviewing the decision of a tribunal, including a disciplinary matters as decided by the House of Lord in *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141, where the law Lords held that:

> Judicial review is not an appeal from a decision but a review of the manner in which the decision was made, and, therefore the court is not entitled on an application for judicial review to consider whether the decision itself was fair and reasonable.
>
> Judicial review is concerned, not with the decision, but with the decision — making process. Unless the restriction on the power of the court is observed, the court will in my view under the guise of preventing the abuse of power, be itself guilty of usurping power.

[10] This case was cited with approval in the case of *T Ganeswaran lwn Suruhanjaya Polis DiRaja Malaysia dan satu Lagi* [2005] 6 MLJ 97; [2005] 3 CLJ 302.

[11] (Other cases referred *Abd Razak bin Atan v Dato' Hj Ahmad Ragib bin Hj Mohd Salleh (sued in his capacity as Assistant Chief Administrator to the Inspector General of Police (Disciplinary) & Ors* [2010] 3 MLJ 753; [2010] 1 LNS 40, *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 CLJ 405).

[12] In order for court to quash the said decision and declare it as wrong in law, it is necessary for the court to consider, whether, in coming into the decision, the respondents has committed an error of law. The test to be applied here is the *Wednesbury* reasonable test. In other words, it is for the court to determine whether the eighth respondent had acted irrationally, illegally, or there was procedural impropriety (reference was made to the case of *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629).

THE FINDING

[13] The applicant's main contention was that he was double jeopardised as he faced two disciplinary proceedings on the same facts. Learned counsel contended that the second disciplinary action against the applicant had already been charged, found guilty and punished. He contended that by proceeding with the second disciplinary proceeding against the applicant for the second time, contravenes art 7(2) of the Federal Constitution which seeks to protect any person from being place in double jeopardy and be punished twice for the same offence. Article 7(2) of the Federal Constitution provides that:

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> A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.

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[14] The doctrine of *autrefois convict* and *acquit* also applies to disciplinary proceeding. In the case of *Harry Lee Wee v Law Society of Singapore* [1985] 1 MLJ 1, the Privy Council held that:

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> Held (1) the doctrine of autrefois convict and acquit is applicable to disciplinary proceedings under a statutory code by which a profession is governed. The principles laid down in *Connelly v Director of Prosecutions* are apt to apply to the circumstances in this case and enable the appellant to rely on the order made against him in the first proceedings as complete bar to further disciplinary action against him in the second proceedings …

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[15] To determine whether there was double jeopardy, it was necessary to consider the charges made against the applicant. In the first proceeding, he was accused of having molested three female students on 2 Mac 2007, Miss Tong, Miss Tong and Miss Choong at the school's sports store. In the second

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proceeding, he was accused of having sexually harassed three female students on 2 Mac 2007, Miss Tong, Miss Yap and Miss Choong.

[16] The time of the alleged offence:

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	Miss Tong	Miss Yap	Miss Choong
First Proceeding	Between 8am until 12.30 pm.	Between 11.15 am until 12.30 pm	Between 11.15 am until 12.30 pm
Second Proceeding	Between 8am until 12noon.	Between 11.15 am until 12.15 pm	Between 11.15 am until 12.15 pm

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[17] After having carefully perused all the relevant documents exhibited, the court is satisfied that the substance of the two charges made against the applicant in both proceedings, were in respect of gross and indecent conduct of the plaintiff towards the three female students.

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[18] The applicant had been punished twice for the same charges by the disciplinary body at the Hulu Langat Education Department, and also the disciplinary body at the Education Commission. The Hulu Langat Education Department issued a stern warning (*amaran keras*) and later transferred the applicant to another school.

[19] Learned senior federal counsel in his written submission has submitted that transfers of public officers are prerogative of the management and has nothing to do with punishment in disciplinary proceedings, in which the court here agrees. Learned senior federal counsel also submitted that exh AS5 was merely a warning letter and there was no mention that the applicant was being punished. However, the court could not agree that exh AS5 was just a simple warning letter. In the said letter, the Disciplinary Committee of the Hulu Langat Education Department had made reference to the relevant disciplinary regulations and it was stated clearly that the offence committed by the applicant was in breach of reg 4(2)(d) and (g) of the 1993 Regulations. Therefore, the punishment made against the applicant was definitely in accordance with reg 38 of the 1993 Regulations which provides from the most lenient ie warning until the most severe ie dismissal.

[20] In all fairness and justice, there should only have been only one charge against the applicant. To charge him twice for the same conduct clearly goes against the spirit and intent of the art 7 of the Federal Constitution.

[21] With regards to the first disciplinary proceeding, the respondents in the affidavit in reply, para 7, stated the following:

> Perenggan 6, 7, 8, 9, 10 dan 11 Affidavit Pemohon, Respondent tidak mempunyai pengetahuan tentang pengataan dalam pernyataan tersebut …

[22] The averment clearly shows that the first respondent had not considered all factors in the applicant's second representation letter (exh AS8) during the deliberation. This is a blatant procedural impropriety committed by the first respondent as the applicant had made reference to the initial disciplinary proceeding and the warning letter was enclosed for easy reference of the first respondent.

[23] Therefore, based upon the above reasoning, the court is will allowed the applicant's application and the decision to dismiss the applicant from public service is hereby quashed.

Application allowed and dismissal quashed.

Reported by Ashok Kumar